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No. 03-48

In the Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Communications Commission's interpretation of its auction regulations for applications for a permit to construct a radio broadcast station.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 321 F.3d 155. The opinion and order of the Federal Communications Commission (Pet. App. B1-B72) are reported at 16 F.C.C.R. 12,061.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2003. A petition for rehearing was denied on April 10, 2003 (Pet. App. C1-C4). The petition for a writ of certiorari was filed on July 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of an administrative licensing proceeding in which the Federal Communications Commission (FCC) had to select among mutually exclusive applications for a permit to construct an FM radio broadcast station in Biltmore Forest, North Carolina. The FCC granted the application filed by Liberty Productions (Liberty) and denied the applications filed by petitioner and others. The grant of the application followed Liberty's winning bid over the other applicant-bidders in an FCC auction.

1. In 1987, when petitioner and others filed their applications, the FCC's practice was to hold a comparative hearing to resolve whether an applicant met the threshold qualifications for a broadcast license and to determine which of the qualified applicants would best serve the public interest. See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The Biltmore Forest applications, therefore, were considered initially in an evidentiary hearing before an administrative law judge.[1] Before that proceeding became final, however, intervening statutory changes caused the FCC to adopt competitive bidding procedures, pursuant to 47 U.S.C. 309, to resolve pending applications, including the Biltmore Forest applications. See Pet. App. A5-A6.[2]

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[1] See *In re Applications: National Communications Indus.*, 5 F.C.C.R. 2862 (1990), aff'd, 6 F.C.C.R. 1978 (1991), modified by, 7 F.C.C.R. 1703 (1992), remanded *sub nom. Biltmore Forest Broad. FM, Inc.* v. *FCC*, No. 92-1645, 1994 WL 116196 (D.C. Cir. Mar. 15, 1994).

[2] In 1997, Congress amended 47 U.S.C. 309 to require the FCC to use competitive bidding procedures to decide among future mutually exclusive applications for new commercial broadcast station licenses and to permit the FCC to use those procedures for appli-

In 1999, the FCC conducted an auction for the Biltmore Forest license. Liberty won the auction. Petitioner's bid was second highest, followed by two other bids. See Pet. App. A6; FCC, *Public Notice, DA 99-2153*, 14 F.C.C.R. 17,186, 17,194 (Oct. 12, 1999).

After the auction, in accordance with its procedures, the FCC considered the losing applicants' objections to the grant of Liberty's application. The FCC determined that an omission from Liberty's pre-auction application concerning family media interests could be cured after the auction; that Liberty was a qualified bidder despite its loan agreement with a third party; and that the post-auction removal of Liberty's 35% bidding credit because of the loan did not require setting aside its win in the auction. Pet. App. B8-B28. In addition, the FCC rejected claims that Liberty had made misrepresentations to the agency at an earlier stage of the proceedings. *Id.* at B32-B43, B64-B65. After Liberty paid the gross amount of its final bid, the FCC granted Liberty's application and dismissed the unsuccessful bidders' applications, including petitioner's. FCC, *Public Notice, Broadcast Actions, Rep. No. 45,043*, 2001 WL 882264 (Aug. 7, 2001).

2. The court of appeals rejected the claims of the losing applicants, including petitioner, that Liberty

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cations pending before July 1, 1997, as were the Biltmore Forest applications. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 258-265. The FCC subsequently adopted rules to apply competitive bidding procedures to such pending applications. See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 F.C.C.R. 15,920 (1998), reconsid. granted in part, 14 F.C.C.R. 8724 (1999), review denied *sub nom. Orion Communications Ltd.* v. *FCC*, 213 F.3d 761, review denied, 221 F.3d 196 (D.C. Cir. 2000) (Table).

should have been disqualified because its application was defective and because it had misrepresented facts to the FCC. Pet. App. A1-A6.

With respect to the contention that Liberty should have been disqualified for failing to submit required information to the FCC before the auction, the court of appeals held that the FCC reasonably interpreted its rules to treat that omission as curable after the auction. Pet. App. A10. The court "agree[d] with the Commission that it should not—more properly, that it need not—disqualify Liberty after the auction on the basis of an omission that, according to the Notice, would disqualify an applicant if discovered prior to the auction." *Ibid.* The court rejected claims that its decisions in *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), and *Superior Oil Co.* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969), required a different result. The court observed that those cases reversed the decision of the Secretary of the Interior to award a lease even though the Secretary had found the applications in question to be incurably defective. Pet. App. A10. Here, the court noted, the FCC reasonably reached the "opposite finding" that the omission of information from the application could be cured consistently with its rules. *Ibid.*

The court of appeals also found "quite reasonable" the FCC's conclusion that Liberty's amendment of its application after the relevant deadline, in order to reflect a loan agreement into which it had entered, was permissible under the agency's rules. Pet. App. A12. Although the loan agreement resulted in Liberty's losing its right to a new entrant bidding credit, so that it would have to pay the full amount of its bid rather than a discounted amount, the court, like the FCC, "fail[ed] to see how [Liberty's] mistake would have deprived the other auction participants of information

as to Liberty's valuation of the frequency, or would have otherwise influenced their bidding strategies." *Id.* at A13.

Finally, the court of appeals rejected, as lacking "any merit whatsoever," claims that Liberty should have been disqualified because of alleged misrepresentations to the FCC. Pet. App. A14.

ARGUMENT

Both of the questions presented in the petition turn on the contention that the court of appeals should not have deferred to the FCC's reasonable interpretation of its auction regulations because the FCC was acting as a "seller of licenses" in this case. Pet. 8. Petitioner raised that claim only in passing below, and the court of appeals did not address it. Nor does that claim—which petitioner characterizes as a "question of first impression" (*ibid.*)—warrant this Court's review. The court of appeals' deference to the FCC's reasonable interpretation of its own rules is consistent with the decisions of this Court and other courts of appeals.

1. In deciding not to disqualify Liberty, the FCC concluded that, although Liberty should have provided the information in question, known as the "family media certification," before the auction, Liberty could cure that omission after the auction. The FCC found that its auction rules and other statements did not provide adequate notice that an initial failure to provide the certification would be fatal to an application. See Pet. App. B8-B10. The court of appeals, in turn, upheld the FCC's conclusion that the dismissal of Liberty's application was not required under the agency's regulations, explaining that "[w]e give 'controlling weight' to the Commission's interpretation of its own regulation 'unless it is plainly erroneous or inconsistent with the

regulation.'" Pet. App. A9-A10 (quoting *High Plains Wireless, L.P.* v. *FCC*, 276 F.3d 599, 606 (D.C. Cir. 2002)).

This Court has articulated a similar standard. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945)); accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); cf. *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) (deference is appropriate only when the regulation is ambiguous). Petitioner acknowledges that agency decisions of the sort at issue here "are normally entitled to substantial deference from reviewing courts." Pet. I. Petitioner contends that the same degree of deference is not warranted, however, "when the agency is selling licenses so as to become, in effect, an interested party in the licensing process." *Ibid.*

a. What petitioner now characterizes as "the central standard of review issue which calls out for intervention by this Court" (Pet. 13) was not addressed by the court of appeals. Nor did petitioner ask the court of appeals to address it. The issue was raised only as a rhetorical flourish in petitioner's principal brief below.

In the introductory paragraph of the "Argument" section of that brief, petitioner asserted that, "[w]ith the lure of capturing top dollar for licenses as the driving force in the FCC's decisions, any deference otherwise due the agency is no longer appropriate." Pet. C.A. Br. 16. Petitioner did not elaborate upon, or even refer to, that assertion anywhere else in its brief —not in the "Standard of Review" section, see *id.* at 14; not in the "Summary of the Argument" section, see *id.*

at 14-16; and not even in the "Argument" section under the heading "The FCC Was Obligated to Comply With Its Own Auction Rules," see *id.* at 16-22. Instead, in contending that the FCC's interpretation of its auction rules was not entitled to deference, petitioner argued only that "the FCC's interpretation is directly inconsistent with the plain language of the rule," *id.* at 21; *not* that the FCC's interpretation, even if not foreclosed by the rule's text, should not be accorded the customary degree of deference. Nor did the other parties advance such an argument. It is thus unsurprising that the court of appeals did not address whether any different degree of deference should apply in the auction context.

"In the ordinary course," this Court "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). The reasons that justify that approach are fully applicable here, notwithstanding petitioner's passing reference to the deference question in its appellate brief. In any event, whether or not the question was properly preserved, this Court's review is not warranted.

b. Petitioner's contention that the FCC's order is entitled to little, if any, deference rests on the erroneous premise that the FCC would gain financially by granting the winning bidder's application. In the first place, auction proceeds are not retained by the FCC, except to the extent necessary to offset the costs of developing and implementing the auction program. They are required by statute to be deposited in the Treasury's general fund. 47 U.S.C. 309(j)(8)(A).

Moreover, the government would have been entitled to *more* revenue, not less, if the FCC had disqualified Liberty and granted petitioner's application. Under the FCC's rules, a winning bidder, if disqualified, must

pay the difference between its bid and that of the second-place bidder *plus* a 3% penalty. 47 C.F.R. 1.2104(g)(1) and (2). Consequently, the FCC has no financial incentive, as petitioner suggests, to refrain from disqualifying the winner of an auction.

c. There is no basis in this Court's decisions for departing from ordinary deference principles simply because an agency is engaged in an activity, such as the conduct of auctions, that generates revenues for the United States. For example, this Court has accorded the same deference to the Internal Revenue Service as to other agencies not involved in such activity. See, *e.g.*, *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 218-220 (2001); *United States* v. *National Bank of Commerce*, 472 U.S. 713, 730 (1985); *United States* v. *Boyle*, 469 U.S. 241, 246 & n.4 (1985); *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967). Such decisions, while not specifically addressing the question sought to be raised here, are inconsistent with petitioner's position that less deference should be given when an agency produces money for the Treasury.

Nothing in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), on which petitioner relies, suggests that the court of appeals erred in according deference to the FCC's interpretation of its auction rules. See Pet. 16. In *Ward*, the Court held that a defendant was deprived of due process when he was tried for a traffic offense before a mayor who was responsible for village finances and whose court, through fines, costs, and fees, provided a substantial portion of village revenues. 409 U.S. at 59. The Court based that holding on the mayor's "two practically and seriously inconsistent positions, one partisan and the other judicial," which created "a presumption of bias toward conviction" in order to generate revenues for the village. *Id.* at 60, 61.

Here, in contrast to *Ward*, the FCC acted solely in an administrative capacity, not a judicial capacity, in deciding whether to grant a license to the highest bidder. No conflict of interest exists when an agency, acting in an administrative capacity, seeks an outcome that provides the optimal return to the public. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-252 (1980). This case, moreover, involves the government's choice among competing applicants for a license, not a deprivation of liberty or property at the government's hands, as in *Ward*.

Petitioner's reliance on *FCC* v. *NextWave Personal Communications, Inc.*, 123 S. Ct 832 (2003), is also misplaced. *NextWave* held that the FCC was precluded by 11 U.S.C. 525(a), a provision of the Bankruptcy Code, from canceling a license for failure to make payments when due. The Court reasoned that the FCC's "policy preference * * * for canceling * * * licenses rather than asserting security interests in licenses when there is a default" could not overcome "rights provided by the plain terms of" Section 525(a). 123 S. Ct. at 840. No comparable question is presented by the present case. Petitioner does not contend that the FCC's action in granting the license to Liberty is inconsistent with any Act of Congress.[3]

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[3] Contrary to petitioner's suggestion, the court of appeals' decision in this case is not in tension with its own earlier decisions in *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), and *Superior Oil Co.* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969). See Pet. 12. In those earlier cases, the Secretary of the Interior issued a lease despite having found that the application was incurably defective. Here, as the court of appeals observed, the FCC had reasonably made the "opposite finding"—that the defect could be cured by amending the application. Pet. App. A10. In any event,

d. The Second Circuit has squarely rejected a claim similar to that raised by petitioner here. That court held that the FCC is entitled to deference in the interpretations of its auction regulations—even in a case, unlike this one, in which the FCC's interpretation produced a financial advantage to the government. *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 57-60 (1999), cert. denied, 531 U.S. 1029 (2000). The court rejected the argument that "the deference ordinarily afforded the FCC's reading of its rules and the statute it administers is inappropriate (or at least not equally compelled)" in that context. *Id.* at 58. The court reasoned that "[t]he financial benefits of the FCC's post hoc interpretation [of its rules] do not extinguish the courts' duty to give deference." *Id.* at 59.

2. There is likewise no merit to petitioner's assertion that the FCC is entitled to deference only on "technical matters" such as the "level of interference between co-channel radio stations." Pet. 14. This Court has not confined deference under the doctrines articulated in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984), and other cases to purely technical matters.

To the contrary, the Court has deferred to the FCC (and other agencies) in a wide variety of contexts. See, *e.g.*, *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 501-523 (2002) (FCC's rules for fostering competition in local telecommunications markets); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 390 (1981) (FCC's approach to implementing federal candidates' statutory right of access to broadcast stations); *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 813-814 (1978) (FCC's media diversification rules); *United States* v. *Midwest Video*

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this Court does not sit to resolve asserted intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Corp., 406 U.S. 649, 674 (1972) (FCC's cable rules) (opinion of Brennan, J.); *id* at 676 (Burger, C. J., concurring).

3. The second question presented in the petition—which asks whether the FCC "must * * * abide by the stated terms of the bidding process, or may * * * modify those terms after the auction" (Pet. I)—rests on the additional erroneous premise that the FCC changed its rules to issue the license to Liberty. See Pet. 11 (alleging "[t]he FCC's alteration of its auction rules after the close of bidding"). No change in the FCC's auction regulations occurred.

Rather, the FCC, construing its existing regulations, concluded that those regulations did not require that Liberty be disqualified for failing to submit the family media certification before the auction. The FCC reasoned that 47 C.F.R. 1.2105(b), which requires an applicant to provide certain certifications before an auction on penalty of dismissal of its application, does not apply to the family media certification. Pet. App. B9. The FCC further reasoned that the Public Notice of the Biltmore Forest auction did not clearly state that an omission of that certification could not be cured. *Id.* at B11. The court of appeals, applying appropriate deference, held that the FCC's construction was reasonable. *Id.* at A10. That holding is correct and presents no question of general significance that warrants this Court's review.[4]

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[4] Petitioner claims to have stopped bidding in the auction based on its prediction that Liberty would ultimately be disqualified. See Pet. 5, 11. The fact that petitioner pursued a high-risk strategy—assuming that it could obtain the license by challenging Liberty's qualifications rather than by making the highest bid in the auction—does not render this case any more suitable for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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